

No. 13,678

IN THE  
United States Court of Appeals  
For the Ninth Circuit

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ARNOLD SWARTZ and MAX GOODMAN, <i>Appellants,</i>
VS.
UNITED STATES OF AMERICA, <i>Appellee.</i>

On Appeal from the District Court of the United States  
for the District of Hawaii.

**BRIEF FOR APPELLEE.**

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**STATEMENT OF JURISDICTION.**

The Appellee agrees with the jurisdictional statements as set out in Appellants' Opening Brief.

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**THE SPECIFICATIONS OF ERROR RELIED UPON.**

There are two specifications of error set out in Appellants' Opening Brief, both to the effect that the trial court erred in denying the motion of both Appellants for a judgment of acquittal made at the conclusion of all the evidence of the case below.

### THE LAW.

The law is well settled as to the position taken by an Appellate Court upon an appeal from an order denying a directed verdict, or judgment of acquittal in the lower court.

“In reviewing, on appeal, after a verdict of guilty has been returned by the jury an order overruling a motion for a directed verdict, we are required to consider the evidence in its aspect most favorable to the government. *Walker v. United States*, 8 Cir., 93 F.2d 383, 392, certiorari denied 303 U.S. 644, 58 S.Ct. 642, 82 L.Ed. 1103; *Firotto v. United States*, 8 Cir., 124 F.2d 532, 533; *Culp v. United States*, 8 Cir., 131 F.2d 93, 100. We neither weigh the conflicting evidence nor consider the denials of the defendant. *Burton v. United States*, 202 U.S. 344, 26 S.Ct. 688, 50 L.Ed. 1057, 6 Ann.Cas. 362.”

*Miller v. United States*, 138 F. 2d 258.

“After verdicts of guilty have been returned by the jury we are required, on appeal from orders overruling motions by defendants for directed verdicts, in reviewing the evidence to consider the testimony in its aspect most favorable to the government, and we may not weigh the facts or determine the guilt or innocence of the accused. *Burton v. United States*, 202 U.S. 344, 26 S.Ct. 688, 50 L.Ed. 1057, 6 Ann.Cas. 362; *Walker v. United States*, 8 Cir., 93 F.2d 383, 392 certiorari denied, 303 U.S. 644, 58 S.Ct. 642, 82 L.Ed. 1103; *Firotto v. United States*, 8 Cir., 124 F.2d 532, 533; *Culp v. United States*, 8 Cir., 131 F.2d 93, 100. It is immaterial that the evidence

is conflicting and that Egan and other witnesses for defendants denied much of the testimony produced by the government. *United States v. Kushner*, 2 Cir., 135 F.2d 668, 673.”

*Egan v. United States*, 137 F. 2d 369.

“\* \* \* As stated by us in *Zottarelli v. United States*, 6 Cir., 20 F.2d 795, 796, we cannot weigh the evidence but we must take that view of it, and the inferences reasonably and justifiably to be drawn from it, most favorable to the Government and determine therefrom whether a verdict against appellant might have been lawfully rendered and if there was substantially competent evidence which would support the conviction, the refusal of a directed verdict must be sustained. It is unnecessary that the guilt of the accused be shown alone by direct evidence. *United States v. Manton*, 2 Cir., 107 F.2d 834, 837.”

*Blalack v. United States*, 154 F. 2d 591.

This Court has many times held to the same effect as the authorities above quoted. In *Hemphill v. United States*, 120 F. 2d 115 (1941, C.C.A., 9th) this Court held as follows, citing three other Ninth Circuit Court cases:

“In an appellate court, the question of the sufficiency of the evidence is a question of law, ‘which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence competent and substantial, before the jury, fairly tending to sustain the verdict.’ *Abrams v. United States*, 250 U.S. 616, 619, 40

S.Ct. 17, 18, 63 L.Ed. 1173. It is well settled that 'if there is any "proper," "legal," "competent," or "substantial" evidence sustaining the charge, [the case] should be submitted to the jury.' *Maugeri v. United States*, 9 Cir., 80 F.2d 199, 202. Again, it has been said, 'The duty of this court is "but to declare whether the jury had the right to pass on what evidence there was."' *Felder v. United States* [2 Cir.], 9 F. (2d) 872, 875, certiorari denied 270 U.S. 648, 46 S.Ct. 348, 70 L.Ed. 779. There being substantial evidence in support of [the] charges, the court would have erred if it had peremptorily directed an acquittal upon \* \* \* the counts. *Pierce v. United States*, 252 U.S. 239, 251, 40 S.Ct. 205, 64 L.Ed. 542.' *Crono v. United States*, 9 Cir., 59 F.2d 339, 340. See, also, *Cossack v. United States*, 9 Cir., 82 F.2d 214. Moreover, in the consideration of such question, the appellate court must view the evidence in the light most favorable to the appellee. *Borgia v. United States*, 9 Cir., 78 F.2d 550, 555.'

Also, in *Allred v. United States*, 146 F. 2d 193 (1944, C.C.A., 9th) Judge Mathews stated as follows:

"As appellant points out, there were conflicts in the evidence. With these, however, we are not here concerned, as they were for the jury, not the court, to resolve."

See also:

*O'Leary v. United States*, 160 F. 2d 333 (1947, C.C.A., 9th).



**THE FACTS.**

On Page 44 of Appellants' Opening Brief they contend that there are five elements which the United States must prove in order to justify a conviction. At this stage of the proceedings, where this case is on appeal from orders overruling motions for acquittal in the Court below, we must satisfy this Court that those elements must have been proven only to the degree of proof required by the authorities cited above. Viewed in the light of the holdings hereinbefore set out, we contend that there is some proof (a) that the zinc ingots were the property of the United States, (b) that the same were stolen from the United States, (c) that Appellants concealed the ingots, (d) with intent to convert the same to their own use and gain (e) knowing the same to have been embezzled or stolen.

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**A. THE ZINC INGOTS WERE THE PROPERTY OF  
THE UNITED STATES.**

Lt. Cmdr. Marrow Matthew Spidell testified that he was the assistant to the base operations officer at Pearl Harbor (R. 47), that he saw zinc in Pearl Harbor in a fenced area and that the zinc was used for Navy purposes (R. 48, 50). He identified a photograph (Government's Exhibit "A") which showed a shed at Pearl Harbor in which zinc was stored (R. 53-54). He identified another photograph (Government's Exhibit "B") which showed certain zinc

marked, "Missouri" and testified that the zinc shown in that picture was some of the zinc that was stored in the shed (R. 55-58), that when he took over the office in May of 1950, there were four piles of zinc stored in the shed (R. 60) and that several months later he went down to the area there and there were only two piles of zinc left (R. 50), that everything within that area is Government property, unless it is otherwise identified (R. 51).

Calvin C. Tate testified that he was a Boatswain's mate assigned to Pearl Harbor and that in September of 1950 he was in charge of the target repair and target upkeep (R. 65), that when first saw the zinc shown in Government's Exhibit "B", there were four stacks of it there and that later there were only two (R. 66-67).

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**B. THE ZINC WAS STOLEN FROM THE UNITED STATES.**

Elden L. Brown testified that he was in military service in August of 1950 and that from August 5, 1950 until August 23, 1950 he was AWOL (R. 75), that he, Walter Blanton, Dixie Lawlor and Joseph Lawlor and Joseph Ludwig stole some zinc from Pearl Harbor (R. 75-76), that the zinc was stolen from the building shown in Government's Exhibit "A" (R. 77), that they stole two piles of zinc like that shown in Government's Exhibit "B" (R. 78), that there were originally two more piles of zinc than those shown in Government's Exhibit "B" (R. 78),

that they sold the stolen zinc to the Honolulu Supply Company (R. 79).

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**C, D, E. APPELLANTS CONCEALED THE STOLEN ZINC WITH INTENT TO CONVERT THE SAME TO THEIR OWN USE AND GAIN KNOWING THE SAME TO HAVE BEEN EMBEZZLED OR STOLEN.**

Brown further testified that on August 18, 1950 he sold stolen zinc to the Honolulu Supply Company, dealing with the Appellant Swartz (R. 81) and that he knew it was on August 18, 1950 because he had received a traffic ticket on August 17, 1950 (R. 91), that Swartz asked him where he got the zinc and Brown told him from Pearl Harbor (R. 80), that Swartz then said it would look funny coming in there in ingots like that and so he marked the ticket (brass) (R. 81-82). Brown identified Government's Exhibit "C" as a carbon copy of the original sales ticket made out by Swartz, that Government's Exhibit "C" bore his, Brown's, signature, was dated June 18, 1950 and showed a sale of brass, although in fact he sold the stolen zinc (R. 81-91), that he threw away the original ticket on that sale (R. 85). Brown testified that he went there three or four times when zinc was sold and was never asked where it came from except on August 18, 1950 (R. 91).

On cross-examination Brown said that he sold zinc twice on August 18, 1950 to the Honolulu Supply Company with an interval of about thirty minutes

between the sales (R. 102) and that each time he dealt with Swartz (R. 103-104), that he received about ONE-HUNDRED DOLLARS (\$100.00) for the zinc (R. 101) and threw away the original tickets for both sales (R. 97).

Vincent Richard Lawlor testified that he stole zinc from the place shown in Government's Exhibit "A" and that it was a type of zinc shown in Government's Exhibit "B" (R. 161), that he sold the stolen zinc to the Honolulu Supply Company (R. 162), that he dealt with Swartz and Swartz did not give him a ticket (R. 164), and that Swartz said "he would take care of it" (R. 164), that he was in a 1942 blue Ford coupe (R. 167) and that his wife and son were with him (R. 168), and that his wife is Filipino-Portuguese (R. 167).

Mack Cottler testified that he is in the scrap metal business, his company being the California By-Products Corporation, and that he has had many dealings with the Honolulu Supply Company (R. 115), that on September 22, 1950 he received an invoice from the Honolulu Supply Company (Government's Exhibit "D") showing 23 drums, approximately 9,742 pounds, sheet and cast aluminum; 5 pieces of 2,450 pounds of sheet and cast aluminum; and two pieces of 390 pounds of sheet and cast aluminum, four drums of brass valves, and one drum marked "Leo Lewis" (R. 116), that a few days later he received a bill of lading (Government's Exhibit "E") dated September 22, 1950 (R. 117), that in that shipment there were

3,305 pounds of zinc (R. 118). Cottler testified that within a few days after the shipment he talked to Goodman and told him there was zinc in the shipment and Goodman told him to hold it (R. 118-119), that he sent a final payment sheet (Government's Exhibit "F") dated October 6, 1950, showing payment for the shipment and showing that he was holding for inspection 3,305 pounds; that zinc is approximately two and one-half times the weight of aluminum; that the 21 drums of aluminum received contained a net weight of 5,197 pounds of aluminum (R. 123), that the net weight of the zinc he received in the shipment in two drums was 3,305 pounds (R. 124).

Harry L. Albrecht testified that he is an agent of the Federal Bureau of Investigation and that he first inquired of the Appellants regarding stolen zinc on September 8, 1950 (R. 201-202), that on that date he saw two zinc ingots of the type he was looking for lying on the ground at the Honolulu Supply Company (R. 203), that Swartz said he bought it from a haole person who had come in a blue Ford coupe, who had his wife with him and the wife was Filipino or Korean (R. 203), that he went back to the Honolulu Supply Company on September 18, 1950 and got the sales tickets and gave a receipt for them (R. 206), that he went back to the Honolulu Supply Company on October 31, 1950 and Goodman told him *he had not shipped any zinc between the first visit on September 8, 1950 and that date of October 31, 1950* (R. 217). He testified that on January 18, 1951, he was informed

by Mr. Cobb, Goodman's attorney, that the zinc had been found on the West Coast and that his office had already located the zinc on December 27, 1950, at the California By-Products Company in Los Angeles, California (R. 217), that there were certain notes affixed to the invoice (Government's Exhibit "D") from Honolulu Supply Company to the California By-Products Company, which he was allowed to copy (R. 223), that the notes showed a total of 28 drums, that the notes showed 20 drums with a net weight of 6,176 pounds; that there were three other drums showing a total of 4,307 pounds, and these drums were encircled on the notes, that the initials A.S. were placed in the circle showing the 3 drums (R. 223-225), that in January, 1952 he went back to the Honolulu Supply Company and the 1950 file concerning the California By-Products Company could not be located (R. 230), that Swartz was present on October 31, 1950 when Goodman stated he had shipped no zinc between September 8, 1950 and October 31, 1950 (R. 232).

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### CONCLUSION.

It is obvious from the proof that the jury could fairly conclude that Swartz bought the stolen zinc knowing that it was stolen. Swartz admitted that the sales ticket (Government's Exhibit "C") was in his handwriting but he said he did not recall the incident. Swartz admitted that he bought zinc from

Lawlor on the morning that Lawlor came down with his wife in a blue Ford coupe.

Goodman's testimony was extremely evasive. His stock answer to practically every question was that "he did not recall". He was unable to recall that he had ever seen the receipt given him by Albrecht for the zinc ingots before. He carried these tactics to the extent that he could not explain how that receipt had gotten into the hands of his attorney, Mr. Cobb. The proof clearly shows that all during the time that agent Albrecht was inquiring at the Honolulu Supply Company about stolen zinc, Goodman was aware that Cottler had received zinc in the shipment of September 22, 1950, yet he never disclosed anything to Albrecht about the zinc until after it had been located at the California By-Products Company by agents of the Federal Bureau of Investigation. Goodman was clearly aware that the shipment of January 22nd contained zinc, having been notified of that fact both by telephone and by letter from Mr. Cottler, yet, on October 31, 1950 he told Albrecht that he had shipped no zinc between September 8, 1950 and October 31, 1950. The jury simply refused to believe his incredible story that he saw no connection between the fact that Albrecht was inquiring about stolen zinc here, and his, Goodman's, knowledge that zinc was in the shipment that had been labeled aluminum.

The evidence, viewed in the light that this Court must now look upon it, was amply sufficient for the

trial Court to refuse to direct a verdict of acquittal,  
and it is respectfully submitted.

Dated, Honolulu, T. H.,  
July 15, 1953.

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